**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling | ) | WT Docket No. 16-421 |

# REPLY COMMENTS OF THE CITIES OF SAN ANTONIO, TEXAS; EUGENE, OREGON; BOWIE, MARYLAND; HUNTSVILLE, ALABAMA; AND KNOXVILLE, TENNESSEE

Tillman L. Lay
Jessica R. Bell
SPIEGEL & MCDIARMID LLP
1875 Eye Street, Suite 700
Washington, DC 20006
(202) 879-4000

*Counsel for the Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; Knoxville, Tennessee*

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The Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee (collectively, "Cities"), hereby reply to the opening comments filed in response to the *Public Notice* in the above-captioned proceeding[1] and the Petition for Declaratory Ruling of Mobilitie, LLC ("Mobilitie").[2]

The Cities strongly endorse and support the opening comments of other local government interests in this proceeding. We reply to the other opening comments as follows.

## I. INTRODUCTION AND SUMMARY

A significant majority of the opening comments filed in this proceeding opposed any further federal intrusion into or preemption of state or local right-of-way ("ROW") or land use laws. The exception, of course, was industry commenters. What is evident from those comments is the primary motivation behind many, if not most, industry requests for FCC action: to persuade the Commission to confer on wireless and neutral host small cell providers a federal entitlement to install their private facilities on state and local government property at below-market rates, on an expedited basis, and subject only to FCC-permitted conditions. But the Communications Act does not, and legally cannot, confer on industry the entitlement it seeks.

Industry seeks to justify its request based largely on the anonymous and unverified allegations made against unnamed state and local governments. Although industry commenters claim they do not name individual local governments out of supposed concern about generating ill will,[3] anonymously attacking a party behind its back is a remarkably deceitful way to avoid

[1] FCC, Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies (Dec. 22, 2016) ("*Public Notice*").

[2] *In re Promoting Broadband for All Ams. By Prohibiting Excessive Charges for Access to Pub. Rights of Way*, Petition for Declaratory Ruling (Nov. 15, 2016) ("Mobilitie Petition").

[3] *See, e.g.*, Comments of CTIA at 39, WT Docket No. 16-421 (Mar. 8, 2017) ("CTIA Comments"); Comments of AT&T at 7 n.19, WT Docket No. 16-421 (Mar. 8, 2017) ("AT&T Comments").

generating ill will. It is more plausibly a way to evade factual rebuttal from the local governments that industry criticizes.

What industry seeks is preemptive federal access to state and local ROW that belong to neither industry nor the federal government. Having previously complained about preferences for siting on municipal property,[4] industry now demands preferential access to ROW and municipal poles to take advantage of what it hopes will be, by Commission decree, cheap rates and favorable terms.[5] The City of Coral Gables submitted an account of its dealings with Mobilitie confirming industry's motivation:

> One proposed location was for an attachment to an existing light pole, but others were for new towers ranging in height from approximate[ly] 26 feet, several at approximately 40-45 feet, three at slightly over 70 feet and one at 120 feet, to be located in commercial and residential areas of the City in the rights of way, often adjacent to single family homes and in areas where there were no above-ground utilities. The proposed 120' pole was to be located adjacent to single family residential homes and a small park. When asked why Mobilitie did not seek to locate its facilities on existing towers and buildings, which seemed possible for some locations, or to site facilities on private property in a manner that would be less impactful, ***Mobilitie responded that it did not want to pay rent.*** It did not [identify] a technical reason why it could not locate its facilities on existing structures or private property.[6]

Industry also asks the FCC to supplant local ROW authority with industry's self-interested judgment about what are reasonable ROW practices. Sprint, for instance, argues that

[4] The Commission previously declined to find such municipal property preferences *per se* unreasonably discriminatory or otherwise unlawful under Section 332(c)(7). *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Report and Order ¶ 278, 29 FCC Rcd. 12865 (Oct. 21, 2014) ("*Spectrum Act Order*"), *amended In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Erratum, 30 FCC Rcd. 31 (Jan. 5, 2015).

[5] *E.g.*, Comments of T-Mobile USA, Inc. at 29-30, WT Docket No. 16-421 (Mar. 8, 2017) ("T-Mobile Comments").

[6] Comments of the Florida Coalition of Local Governments at 22, WT Docket No. 16-421 (Mar. 8, 2017) (emphasis added).

carriers will only put facilities where they are needed, so the Commission should not allow local governments to effectively second guess carriers' decisions.[7]

But wireless providers' self-interest is no substitute for state and local government police power in adequately protecting public safety and preserving public property. The record makes plain that state and local government commenters support deployment of wireless infrastructure,[8] but not at the expense of public safety, or their taxpayers' subsidization of industry's private, profit-making use of public property. The Commission has previously recognized the need to preserve an incentive for wireless providers "to resolve legitimate issues raised by State or local governments within the timeframes defined as reasonable,"[9] and industry comments here reinforce this need.

In these reply comments, the Cities focus on the following points raised in the opening comments in this proceeding:

- The Commission should give no weight to industry allegations about local government actions or practices where the locality is not identified and therefore cannot defend itself;

[7] Comments of Sprint Corp. at 22-23, WT Docket No. 16-421 (Mar. 8, 2017) ("Sprint Comments").

[8] *See, e.g.*, Comments of the City of San Antonio et al., WT Docket No. 16-421 (Mar. 8, 2017) ("Cities Comments"); Comments of the Virginia Joint Commenters at 6-9, WT Docket No. 16-421 (Mar. 8, 2017) (discussing evolving legislation to streamline and expedite application process); City of Rochester Comments at 2, WT Docket No. 16-421 (Mar. 8, 2017) (discussing collaborations with wireless infrastructure applicants); Comments of Smart Communities Siting Coalition at 35-36, WT Docket No. 16-421 (Mar. 8, 2017) (discussing amount of successful small cell deployment) ("Smart Communities Comments").

[9] *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance ("Shot Clock Proceeding")*, WT Docket No. 08-165, Declaratory Ruling ¶ 38, 24 FCC Rcd. 13994 (Nov. 18, 2009) ("*Shot Clock Order*").

- The record makes clear that industry's own actions and inactions sometimes frustrate expeditious wireless infrastructure deployment;
- Additional nationwide, one-size-fits-all definitions will hinder, not promote, deployment;
- The Commission should not, and legally cannot, adopt a "deemed granted" remedy for Section 332(c)(7);
- The Commission should not shorten the Section 332(c)(7) shot clocks;
- There is no need for the Commission to address moratoria further;
- The Commission should not attempt to assert control over access to state and local government property;
- No action on fees is needed;
- No clarification of "prohibit or have the effect of prohibiting" is needed; and
- Local governments must retain the ability to enforce zoning and other generally applicable codes on Section 6409(a) eligible facilities requests.

The Cities also note that opening comments from industry raise several issues outside the scope of the *Public Notice* and the Mobilitie Petition, and those issues should not be further entertained in this proceeding.

## II. REPLY COMMENTS

### *A. As a Matter of Fundamental Fairness, the Commission Should Not Rely on Industry Allegations About Local Government Actions, Inactions, or Practices Where the Locality is Not Identified by Name.*

For the most part, industry commenters seek to justify their requests for Commission action on tales of alleged conflict with and delay by local governments. But few of these accounts provide the name of either the applicant[10] or the local government accused.[11] Most instead refer to an unnamed "municipality" or "locality" in a given state or, sometimes, just a region of the country. This practice deprives these local governments of notice of the allegations against them and an opportunity to respond. And without hearing the other side of the story, the Commission is left with self-serving, unverifiable, and therefore unreliable, assertions.

Although industry claims the reason for not naming names is to avoid localities' "ill will," another obvious benefit to leaving the locality unnamed is to allow the industry member to play fast and loose with the facts without being called on it because the unnamed local government has no opportunity for rebuttal. It would therefore be improper for the Commission to take action based on these anonymous, unverifiable allegations.

The Commission has emphasized the importance of providing accused local governments with the opportunity for rebuttal. Note 1 to Section 1.1206(a) of the Commission's rules provides:

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[10] *See* Comments of the Wireless Infrastructure Ass'n, WT Docket No. 16-421 (Mar. 8, 2017) (discussing experiences of WIA members without identifying the particular applicant) ("WIA Comments").

[11] *See, e.g.*, Comments of Verizon at Appendix A, WT Docket No. 16-421 (Mar. 8, 2017) (identifying localities by general geographic region only) ("Verizon Comments"); AT&T Comments; Comments of Crown Castle International Corp., WT Docket No. 16-421 (Mar. 8, 2017) (one of the few to name many of the governments they discuss) ("Crown Castle Comments"); CTIA Comments; Comments of Mobilitie, LLC, WT Docket No. 16-421 (Mar. 8, 2017) ("Mobilitie Comments"); WIA Comments; Comments of ExteNet Systems, Inc. at 12-17, WT Docket No. 16-421 (Mar. 8, 2017) ("ExteNet Comments").

> In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the parties are so informed.[12]

The Mobilitie Petition is rife with references to the actions of unnamed "communities," "localities," and "cities," each of which Mobilitie accuses of charging excessive or discriminatory fees.[13] And Mobilitie claims that all of "[t]he charges described above clearly violate Congress' directive [in Section 253(c)] because [according to Mobilitie] they are not tied in any way to actual costs of issuing permits and managing rights of way."[14] In other words, the Mobilitie Petition alleges that each of the fees and charges allegedly imposed by each of the local governments it refuses to name violates Section 253. If the Commission were to rule as Mobilitie requests and find those fees and charges inconsistent with Section 253, then it would be preempting those fees and charges. The Mobilitie Petition therefore is a "petition[ ] for declaratory ruling that seek[s] Commission preemption of state or local regulatory authority" within the meaning of Section 1.1206(a), Note 1. Yet Mobilitie has not identified, much less served, the unnamed local governments it accuses. Note 1 therefore requires that the Mobilitie

[12] 47 C.F.R. § 1.1206(a) note 1 to para. (a).

[13] Mobilitie Petition at 4, 14-19.

[14] *Id.* at 20.

Petition "be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules."[15]

Moreover, in the 2009 *Shot Clock Order*, the Commission explicitly "agree[d] that an opportunity for rebuttal is an important element of process," and preserved an opportunity for rebuttal "by establishing presumptively reasonable timeframes that will allow the reasonableness of any particular failure to act to be litigated."[16] Consistent with this principle of fairness and process, the Commission should not rely in this proceeding on nameless accusations as a justification to further preempt local government authority. Relying on these unsubstantiated allegations would not constitute reasoned decisionmaking, nor would it result in sound public policy.[17]

### *B. The Record Reveals That Wireless Applicants Are Themselves the Cause of Delay in Wireless Infrastructure Deployment.*

Although industry commenters assert that delays in wireless facilities deployment are the result of obstruction by local governments, the record suggests otherwise: in many cases, delays result from wireless applicants' actions that make it more difficult for governments to process their applications. Applications are sometimes incomplete; they misrepresent the size and structure of the proposed facilities, or fail to take into account local circumstances, such as undergrounding districts, viewsheds, surrounding structures, or historic areas. Application processing delays resulting from these types of defects would not be alleviated by imposing further FCC regulation on state and local government application processes. Rather,

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[15] 47 C.F.R. § 1.1206(a) note 1 to para. (a). But even if the Mobilitie Petition and industry commenters' allegations about unnamed localities were found not to fall within the literal words of Note 1, there can be no question that they violate the rule's purpose and spirit. The Commission should not tolerate such evasions of its rules, much less reward or encourage them by relying on industry's one-sided, anonymous attacks on unnamed municipalities.

[16] *Shot Clock Order*, ¶ 34 n.111.

[17] *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372, 431-32 (3d Cir. 2004).

encouraging cooperation between industry and local governments has proven more effective in promoting small cell deployment.

The record reveals that Mobilitie and other industry actors often fail to make a reasonable effort to comply with local siting processes, filing incomplete applications, and failing to respond to requests to supply the missing information. For example, Montgomery County, Maryland, explains in its comments that in July and September 2016, Mobilitie filed over 100 incomplete applications, and never responded to the County's written requests for the missing information. Only after ten months of back-and-forth did the County finally receive its first complete application.[18] Montgomery County's experience is hardly unique. The City of Richmond, California, reported receiving a batch of thirty-one incomplete permit applications from ExteNet.[19] The Virginia Department of Transportation ("VDOT or Virginia DOT") commented that out of 500 applications for proposed small cell locations it had received from Mobilitie, 450 were incomplete.[20] The record is replete with further examples of this behavior.[21] As the Wireless Communications Initiative notes, "[t]he wireless industry has hurt itself in some cases by rushing projects forward with poor consideration for aesthetics and community impact."[22]

[18] Supplemental Comments of Montgomery County, Maryland at 20, WT Docket No. 16-421 (Mar. 8, 2017).

[19] Joint Comments of the League of Arizona Cities et al. at 18-19, WT Docket No. 16-421 (Mar. 8, 2017) ("Local Governments Comments").

[20] *See* Comments of the Virginia Department of Transportation at 7 ("To date, Mobilitie has notified VDOT of the proposed locations of 500 small cell facilities. With respect to approximately 450 of those locations, Mobilitie has provided only the latitude and longitude of the proposed site.") ("VDOT Comments").

[21] *See, e.g.*, Local Governments Comments at 17-18; Florida Coalition Comments at 17-18, 28; Comments of Cary, North Carolina at 6, WT Docket No. 16-421 (Mar. 8, 2017) ("Town of Cary Comments") (describing Mobilitie's applications for installation of 120-foot towers in the right-of-way as "confusing and ambiguous, as it was not clear exactly what type of facility was proposed"); Comments on Behalf of the Following Cities in Washington State: Bellevue et al. at 3, WT Docket No. 16-421 (Mar. 8, 2017) ("All of the applications submitted by Mobilitie were, and remain, incomplete") ("Washington State Cities Comments").

[22] Comments of the Wireless Communications Initiative at 7, WT Docket No. 16-421 (Mar. 7, 2017).

Also widely reported by local government commenters are siting applications that misrepresent the size and structure of the proposed facilities, as well as those that ignore unique local aesthetic and historic considerations.[23] Particularly disruptive are applicants that erroneously claim exemptions from local permitting procedures, local regulations, and state environmental compliance laws.[24] The Local Governments, for example, reported in their comments that Mobilitie, Crown Castle, ExteNet, and Verizon Wireless all misrepresented their status as either telephone corporations or competitive local exchange carriers.[25] Applicants' lack of transparency and accuracy in their small cell siting applications delays local governments' ability to process applications efficiently, and requires more back-and-forth with applicants to clarify the deficient portions of the application. And vigilance on the part of local governments has often proven necessary, as some municipal commenters report that industry actors have modified existing wireless facilities, and even constructed entirely new facilities, in public ROW without notice to, much less approval by, the local government.[26]

State and local government comments also demonstrate successful collaboration with the telecommunications industry to expedite the application process. These collaborative strategies are widely varied and often geared toward the needs of the particular community. For example,

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[23] *See, e.g.*, Local Governments Comments at 15 ("In La Crosse, Wisconsin, Mobilitie's representatives presented information about Mobilitie's facilities that falsely represented their physical size and scale."); Board of County Road Commissioners of Oakland County, Michigan at 6, WT Docket No. 16-421 (Mar. 7, 2017) (explaining that Mobilitie sought to build 120 foot monopoles in rights of way that are "full of pedestrian and vehicle traffic, and . . . usually only 66 feet wide," raising unique safety concerns and requiring different permitting procedures from typical 40-foot installations) ("RCOC Comments"); Comments of the City of Jackson at 2, WT Docket No. 16-421 (Feb. 6, 2017) ("[t]he City has serious aesthetic and safety concerns" with the proposed towers) ("City of Jackson Comments").

[24] *See, e.g.*, Local Governments Comments at 10; Texas Municipal League Comments at 20, WT Docket No. 16-421 (Mar. 8, 2017) ("TML Comments"); RCOC Comments at 7; City of Jackson Comments at 2.

[25] Local Governments Comments at 13.

[26] *See, e.g.*, Local Governments Comments at 20-21; Comments of Cityscape Consultants, Inc. at 3, WT Docket No. 16-421 (Mar. 7, 2017) (explaining that in Denison, Texas, "Mobilitie constructed two towers in public rights of way without obtaining the proper permits from the City and by presenting ***their form*** which had a water department employee signature on it as authorization for construction of the facilities.") (emphasis in original).

the City of San Francisco amended its city code in 2011 to permit applicants to install wireless facilities in any zoning district, including residential and historic districts, and to make the application process faster.[27] And the City of Springfield, Oregon commented that after it updated and amended its city code, "no [wireless telecommunications system] facility applications for Discretionary Use or Site Plan Approval have been denied . . . ."[28]

Some localities also report building flexibility into the regulatory process in order to provide efficient siting decisions. Examples include providing government officials the discretion to waive some regulatory requirements, as well as exempting certain types of applications from review altogether.[29] Others report shaping their application processes with input from telecommunications companies. For instance, the Town of Cary, North Carolina, states that:

> During 2011, many workshops were held with Cary staff, representatives from wireless carriers, and citizens, to develop recommendations for amendments to the ordinance to help accommodate [stealth towers]. The Town is similarly willing to engage all interested parties in discussion regarding deployment of small cell and other new technologies.[30]

Similarly, comments on behalf of Washington State Cities describe an amicable relationship with the telecommunications industry: "We are not developing these ordinances, permitting processes, applications or model franchises in a vacuum, but rather in collaboration with

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[27] Comments of the City and County of San Francisco at 4, WT Docket No. 16-421 (Mar. 8, 2017) ("San Francisco Comments").

[28] Comments of Springfield, Oregon at 3, WT Docket No. 16-421 (Mar. 7, 2017).

[29] *See, e.g.*, Comments of the State of New Jersey Pinelands Commission at 4, WT Docket No. 16-421 (Mar. 8, 2017) (explaining that installations of local communications antenna on existing structures are exempt from review so long as they are consistent with a pre-existing communications plan); Comments of the Town of Hempstead, New York at 2, WT Docket No. 16-421 (Mar. 8, 2017) (encouraging pre-application site visits and conferences to identify potential problems with an application, as well as requirements that appear unnecessary and could be waived) ("Town of Hempstead Comments").

[30] Town of Cary Comments at 3.

telecommunications representatives and local utilities providing electricity, fiber and other infrastructure."[31] Some cities have also negotiated master license agreements delineating reasonable conditions for use of the local rights-of-way with Verizon, Mobilitie, Crown Castle, and Zayo.[32] The Smart Communities Siting Coalition reports that "[t]he process [of negotiating a master license agreement with the City of San Antonio] enabled Verizon to plan ahead, with predictability and stability, for its small cell deployment, while simultaneously enabling the City to protect key public interests (such as public safety), critical historic sites . . . and the vibrant tourism economy."[33]

Local governments' opening comments demonstrate that these collaborative strategies effectively decreased application processing time and increased the rate of small cell deployment.[34] The variety of collaborative solutions reported in the opening comments demonstrates not only that there is no need for any one-size-fits-all approach to be handed down by the Commission, but that such an approach would be counterproductive.

### *C. Comments Confirm the Difficulty of Defining Terms for Nationwide Application.*

The *Public Notice* asked for comment about the possibility of setting a different shot clock for "batches" of small cell siting applications and what should qualify as a "batch."[35]

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[31] Washington State Cities Comments at 3.

[32] *See, e.g.*, TML Comments at 19; Comments of the Georgia Municipal Ass'n at 3-4, WT Docket No. 16-421 (Feb. 28, 2017). Some industry commenters discuss such master license agreements relatively favorably (*see, e.g.*, Verizon Comments at 7-8), while others claim that "local governments use these master agreements as a substitute for a comprehensive legal framework" (Comments of Nokia at 5, WT Docket No. 16-421 (Mar. 8, 2017) ("Nokia Comments")). This inconsistency highlights the fact that the only *consistent* industry position is that local governments are the problem and need to be preempted by the FCC.

[33] Report and Declaration of Andrew Afflerbach at 22-23, Exhibit 1 to Smart Communities Comments ("Ex. 1 to Smart Communities Comments").

[34] *See, e.g.*, Smart Communities Comments at 35-36; Town of Hempstead Comments at 2 (granting 500 wireless applications in the past 6 years, and denying none); Comments of the City of Austin at 7, WT Docket No. 16-421 (Mar. 8, 2017) (applications processed in one week or less).

[35] *Public Notice* at 11-12.

Industry comments, however, succeed only in confirming our point: There is no reasoned way to define "batches," much less set a single nationwide shot clock for them.[36]

Industry commenters cannot agree on a definition. Globalstar says that an application should have, at minimum, five small cell facility sites to be a "batch" and seeks a 120-day shot clock to process small cell collocation batches, and a 180-day clock for other batches of small cells.[37] Other industry commenters, however, do not think there should be a longer time period for processing batches.[38]

The term "batch" is even more problematic when applicants seek to place facilities on municipal street light and traffic signal poles. In those cases, the particular type of attachment and the location of the individual pole necessitates a case-by-case approach. Considerations relevant to an application are not only the attachment, but also the structure to which it is attached, which are likely to vary, often significantly, from structure to structure. That further complicates any attempt to define a "batch" of applications or apply a different rule to the processing of such a batch.

Similarly, although few industry commenters offered a definition of "small cell,"[39] there seems to be no uniform definition of what constitutes "small cell" facilities, nor any agreement on what the maximum permissible dimensions of such facilities should be. Despite this lack of agreement, industry commenters nonetheless seek widely varying shot clocks or other remedies for whatever can be deemed a "small cell" application. This, however, is another example of an

[36] Cities Comments at 17, 19-20.

[37] Comments of Globalstar, Inc. at 12, WT Docket No. 16-421 (Mar. 8, 2017) ("Globalstar Comments").

[38] *See, e.g.*, Sprint Comments at 44 (advocating for no batching requirement or any extended deadline when applications are submitted in batches); WIA Comments at 60 (no longer review time for batching).

[39] Eco-Site does attempt a definition. Comments of Eco-Site, Inc. at 2, WT Docket No. 16-421 (Mar. 8, 2017).

area where the impacts, rather than the technical classification, of proposed facilities are likely to be far more relevant to local review, counseling against the adoption of a one-size-fits-all definition.[40]

Ultimately, there are different practices across jurisdictions in how batched and small cell applications are handled most efficiently.[41] A one-size-fits-all approach would not be appropriate here, and would likely hinder progress, as it would force local jurisdictions to adopt a process wholly unrelated to unique local circumstances.

### *D. The Commission Should Not Adopt a Deemed Granted Remedy for Section 332(c)(7).*

The Commission should not accept industry invitations to revisit its prior decisions that it has no authority to impose or require a deemed granted remedy in Section 332(c)(7) cases.[42] The Commission previously considered and rejected industry's arguments, and the factual circumstances—as well as the statutory language—have not changed in the intervening time. As a result, no different conclusion is warranted.[43]

Section 332(c)(7) provides the remedy for alleged violations of the statute:

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[40] *See* Smart Communities Comments at 10-11.

[41] *See, e.g.*, Cities Comments at 20.

[42] *See, e.g.*, AT&T Comments at 25; Comments of Competitive Carriers Ass'n at 13-14, WT Docket No. 16-421 (Mar. 8, 2017) ("CCA Comments").

[43] As in the proceeding that resulted in the *Shot Clock Order*, industry commenters here argue for a deemed granted remedy based on the Commission's earlier decision in *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (Mar. 5, 2007) ("*Video Franchising Order*"). *Compare* T-Mobile Comments at 27-28 (alleging that "the Commission has already adopted a 'deemed granted' remedy in a similar case") *with* CTIA, Petition for Declaratory Ruling at 27, *Shot Clock Proceeding,* WT Docket No. 08-165 (July 11, 2008) (arguing that "[a]s the Commission recognized in the [*Video Franchising Order*], such incentives are necessary to ensure that federal pro-deployment goals are met"). But the Commission's interpretation of Section 621(a) in the *Video Franchising Order* involved a very different statutory framework from that of Section 332(c)(7). Unlike Section 332(c)(7), Section 621(a) contains no language or legislative history giving courts exclusive jurisdiction over disputes arising under it.

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this sub-paragraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief. [44]

Except for RF-related disputes, adjudication in courts is the exclusive remedy for alleged Section 332(c)(7)(B) violations. Section 332(c)(7)(B)(v) provides for judicial review by a court of competent jurisdiction when the state or local government has failed to act within a reasonable period of time. The court, not the Commission, is tasked by statute both with making the ultimate determination as to whether the locality's decision was made within a reasonable period of time and with deciding what the appropriate remedy is if the locality failed to do so. And the court is to do so on a case-by-case basis. Courts undertaking review of failures to act within a reasonable time have, on occasion, issued injunctions requiring the locality to grant the application, but only *after* a comprehensive review of the facts specific to a case.[45] The Commission has already correctly determined that Congressional intent is clear that the "courts should have the responsibility to fashion appropriate case-specific remedies."[46]

Even if the FCC were inclined to reconsider its rationale in the *Shot Clock Order*, the Fifth Circuit's *Arlington* decision affirming the *Shot Clock Order* leaves the Commission with no room to reverse course and adopt a "deemed granted" remedy.[47] The Fifth Circuit noted that,

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[44] 47 U.S.C. § 332(c)(7)(B)(v).

[45] *Shot Clock Order*, ¶ 39 ("It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.").

[46] *Id. See also Spectrum Act Order*, ¶ 284 (again declining to adopt an additional remedy and noting Congressional focus on prompt judicial relief).

[47] *City of Arlington v. FCC*, 668 F.3d 229, 259 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

while a court considering a challenge to state or local government inaction under Section 332(c)(7)(B) will give deference to the FCC's "shot clock" presumption of what constitutes a reasonable period of time, the court in Section 332(c)(7)(B)(v) actions must also be allowed to consider any evidence speaking to the reasonableness of the state or local government's inaction.[48] In other words, the statute entitles the state or local government to the opportunity to rebut *in court* the *Shot Clock Order's* presumption of unreasonableness by providing reasons for the delay, such as extenuating circumstances, the applicant's failure to submit requested information, or the complexity of the particular application.[49] Thus, the *Shot Clock Order* presumption does not decide a case in a particular way, but rather determines which party in a Section 332(c)(7)(B)(v) court action bears the burden of producing evidence to challenge the presumption.[50] A Commission-imposed "deemed granted" remedy, in contrast, would impermissibly usurp the court's jurisdiction under Section 332(c)(7)(B)(v).[51]

### *E. The Record Reveals No Reasoned Basis for Shortening the Shot Clocks.*

Several industry commenters ask the Commission to shorten the existing shot clocks.[52] The Commission should reject the request. Industry commenters have not shown that the existing shot clocks are too long, or that shortening them would lead to faster deployment (as opposed to more court litigation triggered by a shorter shot clock's more rapid expiration in a particular case). Moreover, the same need to accommodate a variety of local fact situations that existed when the Commission adopted the current shot clocks still exists today.

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[48] *Id.*

[49] *Id.* at 259-60.

[50] *Id.* at 256.

[51] *Id.* at 260.

[52] *See, e.g.*, CCA Comments at 11-13; CTIA Comments at 36-38 (asking for 60 days for collocations, 90 days for other applications); Comments of Mobile Future at 4-6, WT Docket No. 16-421 (Mar. 8, 2017) ("Mobile Future Comments"); T-Mobile Comments at 23 (asking for 60/90).

The presumptively reasonable time frame established by the current shot clocks must be flexible because of their general applicability. As the FCC previously stated, "Although . . . the reviewing court will have the opportunity to consider such unique circumstances in individual cases, it is important for purposes of certainty and orderly processing that the timeframes for determining when suit may be brought in fact accommodate reasonable processes in most instances."[53]

Verizon states that "[a]t the time of adoption, the Section 332(c)(7) shot clock for placements and modifications on existing structures did not specifically contemplate small cells."[54] Verizon then asserts that a shorter shot clock is warranted for small cells and would be consistent with the Section 6409(a) shot clock. Yet Verizon ignores that the Commission ruled that the existing shot clocks apply to small cells in its rulemaking implementing Section 6409(a).[55] There, the Commission "clarif[ied] that to the extent DAS or small-cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to the same presumptively reasonable timeframes that apply to applications related to other personal wireless service facilities."[56]

Moreover, the label "small" in the phrase, "small cell," does not mean that the facilities are physically small, nor does it follow that the state or local processes required to review small cell applications will necessarily be shorter than for so-called "macro" facilities. Rather, these

[53] *Shot Clock Order*, ¶ 44.

[54] Verizon Comments at 26.

[55] *See Spectrum Act Order*, ¶¶ 268-272.

[56] *Id.* ¶ 270.

facilities are "designed to serve a smaller area than traditional 'macrocells.'"[57] The record makes plain that many "small cell" facilities are not "small" at all, especially where they are proposed to be placed in the confined space of the ROW.[58] In reality, "[s]mall cell technologies vary in size and profile, depending on the functionality they are designed to provide."[59] Verizon and other industry commenters urging shorter shot clocks are simply wrong in suggesting otherwise.

### *F. "Existing Base Station" in Section 6409(a) Does Not Include Structures Not Supporting Any Wireless Facilities at the Time of the Application.*

Industry commenters ask the Commission to find that a support structure need not actually have any wireless services facilities attached in order to be considered "an existing wireless tower or base station" under Section 6409(a).[60] As an initial matter, this issue is outside the scope of the *Public Notice*. It raises significant concerns for many state and local governments, and any changes to the Commission's interpretation of "existing" in this context should not be considered without a full opportunity for notice and comment rulemaking. Should the Commission nevertheless decide to entertain this issue in this proceeding, however, the Cities urge the Commission to find that such an interpretation would be contrary to the plain meaning and the intent of the statute.

In the *Spectrum Act Order*, the Commission defined "existing . . . base station" as a structure that "*at the time of the application*, supports or houses an antenna, transceiver, or other

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[57] Ex. 1 to Smart Communities Comments at 2. *See also* Smart Communities Comments at 12-13 ("The term 'small cell' is typically used to describe an installation that serves a small area—not to distinguish between facilities that are 'small v. those that are large.'").

[58] *See* Smart Communities Comments at 12-13; NATOA Comments at 11-12. *See also* San Francisco Comments at 27 (even where facilities are physically small, they can still have "a substantial impact in a dense, urban setting").

[59] Ex. 1 to Smart Communities Comments at 2; *id.* at 3-6 (photographs of "small cell" installations showing variety in size).

[60] *See, e.g.*, Crown Castle Comments at 38; Verizon Comments at 27-30; Crown Castle Comments at 38-39.

associated equipment that constitutes part of a 'base station.'"[61] The notion that any existing building, pole or other structure with no wireless facilities at all could be considered an "existing base station" within the meaning of Section 6409(a) flies in the face of the statute's plain language, as well as its purpose. Section 6409(a) rests on the premise that modifications or changes to existing wireless facilities that do not involve a substantial change in size should be subject to more streamlined review. But that premise evaporates if every single existing structure in a locality that has no wireless facilities on it is treated as an "existing base station." Industry's warped reading of the statute would force localities to substantially revise and enlarge the scope of their land use and building code reviews of all new structures generally, because localities would now have to review not only the structure as proposed, but also the structure as a future potential "existing base station" susceptible to the modifications permitted by Section 6409(a) without further full review. This would, in effect, subvert local processes that function independently of, and for purposes wholly unrelated to, the siting of wireless facilities. Section 6409(a) cannot be stretched that far.

To be sure, the Cities are aware of the August 2016 change to the National Programmatic Agreement's definition of "[c]ollocation" as "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, *whether or not there is an existing antenna on the structure*."[62] But the emphasized language was added in August 2016, long after the Commission's *Spectrum Act Order*. This language was *not* in the 2009 Collocation Agreement, which the FCC had pointed to in the *Shot Clock Order* and *Spectrum Act Order*, and thus the

[61] *Spectrum Act Order*, ¶ 168 (emphasis added).

[62] 47 C.F.R. pt. 1, app. B (emphasis added).

language added in 2016 cannot now be grafted onto the 2009 *Shot Clock Order* or the 2015 *Spectrum Act Order*. Further, in making that 2016 change to the Collocation Agreement, the FCC clarified in its notice of these amendments that the agreement only applies to its National Historic Preservation Act Section 106 review process.[63] This amendment to the National Programmatic Agreement therefore does not support expanding the term, "existing base station," as industry commenters suggest.

Further, in the appeal of the *Spectrum Act Order*, the FCC defended its definition of "base station" against a challenge that it was overly broad—essentially swallowing the definition of "tower"—by conceding that while "tower" includes structures not currently supporting wireless facilities, the term "base station" does not.[64] The Fourth Circuit, in upholding the FCC's definition, specifically relied on the Commission's argument that "a 'base station' includes a structure that is not a wireless tower only where it already supports or houses such equipment."[65] The Commission cannot, consistent with *Montgomery County*, now interpret "base station" to include structures without any wireless facilities.

### *G. No Additional Remedy is Needed to Address Moratoria.*

Industry commenters point to moratoria as obstacles to deployment of small cell facilities[66] and seek "clarification" that moratoria violate Section 253(a).[67] But they acknowledge that the Commission already has stated clearly that moratoria do not toll Section

[63] *In re WTB Seeks Comment On Revising the Historic Preservation Review Process for Small Facility Deployments*, WT Docket No. 15-180, Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 31 FCC Rcd. 8824 (Aug. 8, 2016).

[64] *Montgomery County v. FCC*, 811 F.3d 121, 132-33 (4th Cir. 2015).

[65] *Id.* at 133.

[66] AT&T Comments at 7; CCA Comments at 31-34; CTIA Comments at 12.

[67] AT&T Comments at 10; CTIA Comments at 25-26; Mobilitie Comments at 10-12.

332(c)(7) timeframes,[68] and they also overlook that due to Section 332(c)(7)(A), Section 253(a) does not even apply to local decisions about the siting of small cell facilities.

As we and others have already pointed out, Section 332(c)(7)(A)'s "nothing in this Act" language means that Section 253(a) does not apply to—or even so much as "affect"—local decisions regarding the placement of wireless facilities, including small cell facilities.[69] Section 332(c)(7)(A), by its terms, bars application of Section 253 to local authority over wireless siting.

Moreover, industry's misguided effort to apply Section 253(a) to wireless siting ignores that the Commission has already dealt with moratoria under Section 332(c)(7)(B). In the *Spectrum Act Order*, the Commission "clarif[ied] that the shot clock runs regardless of any moratorium."[70] The Commission went on to state:

> We are confident that industry and local governments can work together to resolve applications that may require more staff resources due to complexity, pending changes to the relevant siting regulations, or other special circumstances. Moreover, in those instances in which a moratorium may reasonably prevent a State or municipality from processing an application within the applicable timeframe, the State or municipality will, if the applicant seeks review, have an opportunity to justify the delay in court.[71]

As with other issues arising under Section 332(c)(7), the Commission found that courts were "well situated" to resolve disputes in this area.[72]

Yet industry commenters protest the adequacy of a court remedy, arguing that the remedy provided by statute is insufficient to prevent delays.[73] It is unclear why, particularly in the case

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[68] AT&T Comments at 7; CCA Comments at 31.

[69] *See, e.g.*, Cities Comments at 10-14; Smart Communities Comments at 51-55.

[70] *Spectrum Act Order*, ¶ 265.

[71] *Id.* ¶ 266.

[72] *Id.* ¶ 267.

[73] CCA Comments at 31.

of a moratorium, the expedited case-by-case court remedy provided by Section 332(c)(7)(B)(v), coupled with the FCC's presumptive shot clocks, would be insufficient. But even if it were, the court remedy is what Congress gave; if industry wants more, it must go to Congress. An unelected Commission cannot give industry what Congress declined to give it.

### *H. The Proprietary Nature of the ROW is a Matter of State Law that the Commission Cannot Preempt or Change.*

Industry commenters ask the Commission to clarify the application of the Commission's shot clocks to municipal property, including ROW and poles.[74] What industry commenters seek, in essence, is to have an unelected federal agency construe a statute to give private for-profit companies a federal right to install their facilities on state and local property. But neither Section 253 nor Section 332(c)(7) can be stretched to authorize such a federal taking of state and local government property. Congress would need to clearly provide for a taking, and even with just compensation,[75] there would still remain the question whether the Constitution would permit Congress to commandeer state and local property for a federal purpose.[76] Thus, the Commission cannot grant the relief industry seeks.

T-Mobile nevertheless argues that access to the ROW and municipal poles is "fundamentally different" from access to a municipal building or park because poles and the ROW are "public property *intended to serve as the locations for public services.*"[77] This oversimplification fails to grasp that it is state and local law, not federal law or the FCC, which decides what permissible "public services" are entitled to special access to state or local ROW. For example, under many state and local laws, the ROW's primary public purpose is vehicular

[74] *See* CTIA Comments at 19, 43; Mobilitie at 21; T-Mobile Comments at 30; CCA Comments at 28.

[75] *See* Cities Comments at 27-28.

[76] *See id.* at 28.

[77] T-Mobile Comments at 30.

and pedestrian transportation, *not* utility services, much less non-utility services provided by non-utility entities.[78] Similarly, street light and traffic signal poles are primarily for municipal public safety functions, not to enhance the sales of private commercial services. It is the responsibility of the state or local government, not a wireless applicant or the Commission, to determine how best to use state or local public ROW or other public property to serve the public good.[79]

The relevant inquiry to determine whether a state or local government's interest in the ROW is proprietary is whether the government is acting as a landlord or as a regulator.[80] But that is a matter of state law, and the answer varies not only by state, but from ROW to ROW within a state. "Since rights-of-way definitions, access restrictions, and safety considerations differ between the states, the rights granted to states to allow and regulate utilities or any other non-highway use of rights-of-way must not be infringed."[81] The Commission lacks the constitutional and statutory authority to rewrite the laws of the fifty states relating to ROW ownership and access to make them uniform.[82]

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[78] *See, e.g.*, Comments of Maine Department of Transportation at 1, WT Docket No. 16-421 (Mar. 8, 2017) ("the Maine Law Court has made it clear that transportation uses are paramount on the State's highways and bridges").

[79] *See* TML Comments at 7 (Texas municipalities "hold the public property in trust, as fiduciaries, to protect the public's interest, with only the state having a superior claim"); Comments of the National Ass'n of Counties at 3, WT Docket No. 16-421 (Mar. 8, 2017) (ROW are "held in trust by local governments to benefit the local community").

[80] *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 421 (2nd Cir. 2002) ("[W]e conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity[.]"); *see also Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200 (9th Cir. 2013); *New York State Thruway Auth. v. Level 3 Commc'ns, LLC*, No. 1:10-cv-0154, 2012 U.S. Dist. LEXIS 45051, at *18-19 (N.D.N.Y. Mar. 30, 2012) (considering proprietary exemption in the context of Section 253); *Coastal Commc'ns Serv., Inc. v. City of New York*, 658 F. Supp. 2d 425, 443 (E.D.N.Y. 2009) (same).

[81] *See* Comments of the American Ass'n of State Highway and Transportation Officials at 1, WT Docket No. 16-421 (Mar. 21, 2017).

[82] *See* Cities Comments at 14-15.

### *I. The Commission Should Not Act on Industry's Fee Arguments.*

Industry commenters argue that, to qualify as "fair and reasonable" compensation under Section 253(c), fees charged by municipalities must be limited to costs, or at least cost-based.[83] As we and others have argued, however, "fair and reasonable compensation" cannot be construed to be limited to costs or cost-based fees, as is evident from the plain language and legislative history of Section 253.[84]

Moreover, what industry says it wants—ROW and pole fees that are uniform, predictable and minimal in amount—is flatly inconsistent with its professed desire for truly cost-based fees.[85] A truly cost-based fee structure would vary, potentially widely, not only from locality to locality, but from street to street and from pole to pole within a locality. And actual costs would certainly increase over time, meaning that later-arriving applicants would therefore have to pay more than earlier-arriving applicants.

Local government commenters have introduced expert testimony concerning the economics of ROW pricing.[86] It makes plain that charging a fee for ROW use "helps ensure that the ROW will be used in an efficient manner," and charging a fair market fee (not below-market) helps ensure that external costs are not shifted from private companies to the public and that the ROW will not be overused.[87] Competition—among municipalities, between municipal and

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[83] *See, e.g.*, AT&T Comments at 17; Globalstar at 14; Initial Comments of Lightower Fiber Networks at 29, WT Docket No. 16-421 (Mar. 8, 2017) ("Lightower Comments"); Comments of the U.S. Chamber of Commerce at 3-4, WT Docket No. 16-421 (Mar. 8, 2017); WIA Comments at 19.

[84] Cities Comments at 21-25; Smart Communities Comments at 58-62.

[85] Conterra Broadband goes so far as to say that even having to negotiate reasonable (according to Conterra) fees is a drain on their resources. Comments of Conterra Broadband Services and Uniti Fiber in Response to Public Notice at 19, WT Docket No. 16-421 (Mar. 8, 2017) ("Conterra Broadband Comments").

[86] The Economics of Government Right of Way Fees, Dr. Kevin Cahill, Ph.D., Exhibit 2 to Smart Communities Comments.

[87] *Id.* at 5.

private property, and in the form of elected officials' need to be reelected—operates to control above-market pricing.[88] Market-based pricing will promote rapid deployment that is "consistent with the most efficient use of available resources."[89]

Further, even assuming that the fee structure should be cost-based, there are questions about how costs should be determined, and what counts as a "cost"—questions that industry does not even acknowledge, much less seriously address. For example, the Virginia DOT introduced evidence in its opening comments showing the number of traffic accidents involving collisions with poles in the ROW.[90] The number and severity of these ROW pole crashes prove the basic need to preserve the state or local ROW owner's authority to regulate and control all siting in the ROW. But those same figures also show the difficulty involved in attempting to determine the true economic "cost" of erecting new poles in the ROW. How does one value the increased public safety risk of erecting a new pole—and thus a new obstacle into which vehicles may crash—in the ROW? How does that factor into ROW "cost"? Must a state or locality endure that genuine, but difficult to quantify, cost? Or can it decide that the increased risk to life and property is not worth the benefits of a new pole in the particular ROW location where an applicant wishes to install it? These are not issues that the Commission is remotely competent to resolve, much less resolve on a "one-size-fits-all" basis.[91]

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[88] *Id.* at 6-7.

[89] *Id.* at 13 (additionally noting that Mobilitie's proposed methodology "will predictably lead to inefficient deployment at substantial social cost").

[90] *See* Virginia Utility Pole Collisions, Injuries & Fatalities at 1, Exhibit 1 to VDOT Comments (showing 173 fatalities from 2011-2015 in crashes that involved at least one vehicle hitting a utility pole) ("Ex. 1 to VDOT Comments").

[91] Cities Comments at 20.

Industry commenters also take issue with local governments' use of consultants and the associated consultant fees.[92] Local governments may choose to use consultants to more efficiently process applications. Oakland County, Michigan, for example, reports hiring a consultant to create a database of communications infrastructure, with the goal of allowing wireless carriers to quickly identify collocation opportunities.[93] Why applicants may use consultants (which they often do), yet local governments apparently should not, industry members do not explain. Moreover, where wireless facility applicants claim that, absent grant of the application, a "prohibition" will occur, localities will need radio engineering expertise to assess the validity of that claim—expertise that many localities can most cost-efficiently obtain via contract rather than full-time employees. Given the variety of local government sizes, needs, and staffing across the country, the Commission should not attempt to dictate *how* localities are able to process applications through limitations on fee structures or a presumption against the use of consultants.

### *J. The Commission Need Not Clarify The "Prohibit or Have the Effect of Prohibiting" Provisions of 253(a) and 332(c)(7).*

Industry commenters assert that some courts have interpreted Section 253(a) inconsistently with the Commission's *California Payphone Order*,[94] characterizing the Eighth Circuit's decision in *Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), and the Ninth Circuit's decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), as creating a stricter standard for preemption under

[92] *See, e.g.*, Nokia Comments at 12; T-Mobile Comments at 11.

[93] RCOC Comments at 5-6.

[94] *In re Cal. Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Section 253(d) of the Commc'ns Act of 1934*, CCB Pol 96-26, Memorandum Opinion and Order, 12 FCC Rcd. 14191 (July 17, 1997) ("*California Payphone Order*" or "*California Payphone*").

Section 253(a).[95] Some of these commenters ask the Commission to rule that the preemption standard set out in *California Payphone* applies, while others go so far as to ask the Commission to reinstate the rejected "may prohibit" test announced in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *overruled in Sprint Telephony*, 543 F.3d at 578.[96]

The Commission should reject industry's effort to resurrect *Auburn*'s "may prohibit" test—a test that was subsequently overruled by the court that originally adopted it, rejected by the Eighth Circuit, adopted by no other circuit, and is contrary to the plain language of Section 253(a).[97] No court accepts *Auburn*'s "may prohibit" reading of Section 253(a); to ask the Commission to reinstate it is to ask an unelected agency to overrule the explicit and consistent holdings of the Article III courts that have construed Section 253(a), and to prescribe a standard that is contrary to law.[98]

Nor does the Commission need to make any broad pronouncement reaffirming *California Payphone*. There is no simply no evidence that *any* court disagrees with *California Payphone*, or is interpreting Section 253(a) inconsistently with *California Payphone*.[99] In *California Payphone*, the Commission concluded that state and local action "has the effect of prohibiting" and would be preempted under Section 253(a) when it "materially inhibits or limits the ability of any competitor or potential competitor" to provide telecommunications service. In other words,

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[95] *See, e.g.*, Mobile Future Comments 3-4; AT&T Comments at 36-37.

[96] Lighttower Comments at 18; WIA Comments at 36-37.

[97] *See, e.g.*, *Level 3*, 477 F.3d at 533 ("[N]o reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services . . . ").

[98] *See Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (noting that the FCC "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends") quoted in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring).

[99] Globalstar, for example, claims that "[t]he federal courts are divided on the meaning" of *California Payphone*'s "materially inhibits or limits" language, yet it provides no cases to back up its conclusion. *See* Globalstar Comments at 10.

a factual showing of prohibitory impact was required, as the regulation must "actually prohibit or effectively prohibit" the provision of services in order to be preempted.[100] The Eighth and Ninth Circuits' interpretation of Section 253(a) in *Level 3* and *Sprint Telephony*, requiring plaintiffs making 253(a) claims to show "effective prohibition, rather than the mere possibility of prohibition," is fully consistent with *California Payphone*'s fact-based standard.[101] Other circuits agree on this interpretation.[102] Moreover, in a brief to the Supreme Court, the Commission itself has acknowledged both that there is no conflict among the circuits on the "prohibition" standard in Section 253(a), and that the Eighth and Ninth Circuits' interpretation of Section 253(a) is consistent with its own.[103]

Industry commenters also argue that the Commission should issue a declaratory ruling concerning the evidentiary standard required to show that the denial of a wireless siting application "prohibits or has the effect of prohibiting" the provision of wireless service under Section 332(c)(7)(B).[104] These commenters ask the Commission to resolve an alleged split among the circuits on the Section 332(c)(7)(B) "prohibition" standard:

> The First, Fourth, and Seventh Circuits have imposed a "heavy burden" of proof to establish a lack of alternative feasible sites, requiring the applicant to show not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try. By contrast, the Second, Third, and Ninth Circuits have held that an applicant must show only that its proposed facilities are the least intrusive means for filling a coverage gap in light of

[100] *California Payphone Order*, ¶¶ 38, 42.

[101] *Sprint Telephony*, 543 F.3d at 578 (quoting *Level 3*, 477 F.3d at 532-33).

[102] *See, e.g.*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

[103] *See* Brief for the United States as Amicus Curiae at 9, 11, *Level 3 Commc'ns v. City of St. Louis*, 557 U.S. 935 (2009) (Nos. 08-626 and 08-759) ("Nor is there a clear conflict among the circuits on the standard for preemption under Section 253(a) . . . . The Eighth and Ninth Circuits' interpretation of Section 253(a) appears to be consistent with that of the FCC.").

[104] *See, e.g.*, Sprint Comments at 15; Globalstar Comments at 10.

> the aesthetic or other values that the local authority seeks to serve.[105]

Some industry commenters mis-frame the discussion of Section 332(c)(7) evidentiary standards within the context of *California Payphone*, even though *California Payphone* is a Section 253(a) case, not a Section 332(c)(7) case.[106] These comments reveal that industry is conflating Sections 253(a) and 332(c)(7).[107] But only Section 332(c)(7), *not* Section 253, applies to local decisions on small cell/DAS facility siting.[108] Neither provision, however, requires further Commission interpretation at this time.

Industry commenters point to no case where the supposed split in the circuits over the Section 332(c)(7)(B) "prohibition" standard affected the outcome of the case. In fact, it is difficult to see what the difference is between, on the one hand, the burden of proving that the proposed site is the "least intrusive means" and, on the other, the "heavy burden" of showing there are no alternative feasible sites that are less intrusive. And absent identification of any case where these supposedly different standards have resulted in different outcomes, any alleged conflict is illusory. All circuits assign the burden of proof to the complaining applicant. Furthermore, as the Cities previously pointed out, whether a particular action has the effect of prohibiting "the provision of service" is a highly fact-specific inquiry that will differ depending on the circumstances of each particular case. As a result, this inherently case-by-case inquiry is best left to the courts, where Congress intended it to be.

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[105] *Public Notice* at 10-11 (internal quotations and citations omitted).

[106] *See, e.g.*, Globalstar Comments at 10 ("[T]he Commission has previously found that whether a state or locality's actions have the effect of prohibiting the provision of service turns on whether those actions 'materially inhibi[t] or limi[t] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.' [Citing *California Payphone*.] The federal courts are divided on the meaning of this statutory language. Some courts place a heavy evidentiary burden on carriers attempting to meet this test; others shift the burden to states and localities if an applicant demonstrates that its proposed deployment represents the least intrusive available siting approach.").

[107] *See* ExteNet Comments at 44 (acknowledging this confusion).

[108] Cities Comments at 16.

### *K. Local Governments Should Be Able to Continue to Enforce Zoning and Other Generally Applicable Codes on Eligible Facilities Requests.*

A few industry commenters urge the Commission to limit the application of certain generally applicable permitting requirements to applications to install small cell facilities in the ROW.[109] But the Commission determined in the *Spectrum Act Order* that: "States and localities may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety."[110] Industry offers no reason why the Commission should revisit this imminently correct decision.

On the contrary, state and local government commenters have shown the importance of subjecting all wireless siting applications to generally applicable health, safety and building codes, and the record supports explicit preservation of these state and local processes.[111] The record here reveals that installing additional facilities in the ROW can have adverse traffic accident consequences.[112] The record also shows that many so-called "small cell" applications include additional pieces of equipment at the particular site, such as power supplies and additional support structures or cabinets, that are not "small" at all.[113] Local government review of any new facilities in the ROW must consider pedestrian access and access by persons with

[109] *See, e.g.*, Crown Castle Comments at 29.

[110] *Spectrum Act Order*, ¶ 188.

[111] And the Fourth Circuit agreed, upholding the *Spectrum Act Order* with the observation that "Section 6409(a) and the Order preserve . . . local authority to condition approval on compliance with 'generally applicable building, structural, electrical, and safety codes' and other public safety laws." *Montgomery County*, 811 F.3d at 131 (citing *Spectrum Act Order,* ¶ 21).

[112] *See* VDOT Comments at 6; Ex. 1 to VDOT Comments; Comments of the Connecticut Department of Transportation at 1, WT Docket No. 16-421 (Mar. 8, 2017) (discussing need to control state highway ROW to protect safety and welfare of the public).

[113] *See* Smart Communities Comments at 12.

disabilities, which may be obstructed by installations.[114] These reviews are crucial to maintaining the balance between public safety, local planning needs, and expeditious wireless facilities deployments—a balancing that the FCC is neither qualified nor authorized to make.

### *L. Industry Commenters Raise Issues Outside the Public Notice's Scope.*

Industry commenters raise a variety of issues that are outside the scope of the *Public Notice*, including the scope of historic preservation and environmental reviews,[115] rules applicable to fiber,[116] and specific reforms related to macrocells.[117] The Commission should decline to take any action in this proceeding with regard to these and other issues outside the scope of the *Public Notice* and the Mobilitie Petition.

## III. CONCLUSION

For the reasons discussed above, as well as those set forth in the Cities' opening comments and in the comments of other local government interests, the Commission should deny the Mobilitie Petition and refrain from taking any further action in this docket.

[114] *See id.* at 5.

[115] *See, e.g.*, CCA Comments at 35-44; CTIA Comments at 47-49; Sprint Comments at 44-47; Verizon Comments at 33-39.

[116] Conterra Broadband Comments at 11-14.

[117] Comments of NTCH, Inc. at 1, 4, 8, WT Docket No. 16-421 (Mar. 8, 2017).

Respectfully submitted,

/s/ *Tillman L. Lay*

Tillman L. Lay
Jessica R. Bell
SPIEGEL & MCDIARMID, LLP
1875 Eye Street, Suite 700
Washington, DC 20006
(202) 879-4000

*Counsel for the Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; Knoxville, Tennessee*

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